No. 15652

IN THE

United States
Court of Appeals
For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
Appellant,

vs.

BRADLEY MINING COMPANY,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court
For the District of Idaho, Southern Division

PAUL S. BOYD,
P.O. Box 2084, Boise, Idaho

E. H. CASTERLIN,
P.O. Box 1384, Pocatello, Idaho

DALE CLEMONS,
Idaho Building, Boise, Idaho,
Attorneys for Appellants.

No. 15652

IN THE

United States
Court of Appeals
For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
Appellant,

vs.

BRADLEY MINING COMPANY,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court
For the District of Idaho, Southern Division

PAUL S. BOYD,
P.O. Box 2084, Boise, Idaho

E. H. CASTERLIN,
P.O. Box 1384, Pocatello, Idaho

DALE CLEMONS,
Idaho Building, Boise, Idaho,
Attorneys for Appellants.

SUBJECT INDEX

CITATIONS

IN THE

United States
Court of Appeals
For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
Appellant,

vs.

BRADLEY MINING COMPANY,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court
For the District of Idaho, Southern Division

ARGUMENT

United, in reply to Bradley's brief, sets forth herein its position and reply.

The decision of this Court of May 15, 1956, United Mercury Mines Company v. Bradley Mining Company, 233 F. 2d 205, states at page 207 with reference to the "net smelter returns" clause:

> "By its terms this clause is limited to situations where amounts are received (by Bradley) from (outside) smelters."

Thus, under the facts in our case, the net smelter returns clause does not apply to the Yellow Pine Smelter operations.

The sole issue is,—does the "net revenue" clause apply to the operations at the Yellow Pine Smelter. This Court said in the same decision at the same page:

> "We see no reason why, as a matter of law, the 'net revenue' could not be controlling."

The question of law is thus eliminated and there is left the problem to determine if, as a matter of fact, the "net revenue" clause applies.

If, as a matter of fact, the "net revenue" clause does not apply to the operations at the Yellow Pine Smelter, then the parties have been operating outside the terms of their contract. Generally, the various provisions of a contract must be so construed, if possible, to give force and effect to every part thereof. Wright vs. Village of Wilder, 117 P. (2) 1002, 63 Ida. 122.

A contract must be given effect according to its terms whenever possible and courts cannot substitute or write a new contract for the parties. Durant v. Snyder, 151 P. (2) 776, 65 Ida. 678.

Where the language of a contract is clear, courts give effect to the language employed according to its ordinary meaning. Durant v. Snyder, supra.

It must be remembered that prior to December 31, 1941, the parties were lessor and lessee. Whatever work the lessee did in mining the ore was with reference to the lessor's property and was governed

by the terms of the lease. Whatever was done with the ore after it was mined was also the subject matter of the lease in which the parties generally agreed that the ore was to be shipped to a smelter in the owner's name and the net smelter returns divided in accordance with the agreement, but sometimes agreed that the ore was to be otherwise treated and the values sold in the name of the owner and the proceeds divided per agreement. The lessor (owner) had control of its own property until the time for the division of the returns from the smelter or from an ore buyer in the market.

After December 31, 1941, the relation was that of owner and unpaid seller, Bradley being the owner and United the unpaid seller. The owner agreed to pay the purchase price of the property (claims and values of every kind therein) in a particular manner, to-wit:—by turning over to the seller, whenever it was received by the owner, five percent of the money from the mint, from the smelter, or from any other purchaser of the "concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho" (R 17) and, under certain conditions certain other costs.

After December 31, 1941, whatever Bradley did with the ores from the claims was with respect to its *own property* and without any control of the seller. Bradley, as owner, elected what to do with the values and when and to whom to sell the same; they were Bradley's property, subject to Bradley's management and control in every respect.

All that Bradley, owner, was required to do was to pay over to United 5% of its receipts from the sale of values to a smelter or to a "purchaser."

Bradley, in its brief, argues at great length concerning the difference between a "mining process" and a "smelting process." United contends that this is immaterial for the following reasons: First, Bradley was operating on its own values, for its own use and according to its independent judgment. Second, Bradley agreed to pay, when the concentrates were not sent to an independent smelter, 5% of whatever it received from the sale of values "shipped, taken or produced from said properties" regardless of the state of refinement. Third, the parties agreed to all deductions that were to be taken from the "amounts received" and if there were to be other deductions the same would have been included with the enumerated deductions (R 17-18). Fourth, the erection of a smelter or other reduction works was discussed and the parties finally decided to cover the situation with respect to trucking costs by the language which appears in the contract (R 18). Fifth, the officers of the respective parties were experienced mining men and operators and it must be assumed or inferred that they knew at all times the practice of mining, smelting and metallurgy.

The difference between mining operations and smelting operations, as such, is immaterial in computing 5% of *money received* from the purchaser of any values which found their origin in the claims, less the deductions enumerated in the contract as

agreed upon, regardless of whether the purchaser was a smelter or a person other than a smelter.

The language of the agreement is plain, clear and unambiguous with reference to sales to a smelter or to a purchaser. The plan conceived by Bradley for paying royalties on concentrates processed at the Yellow Pine Smelter is foreign to the terms of the agreement in that it is not based on "any amount received," but is based on a hypothetical situation which may vary from day to day, leaving the day on which the market value is taken up to Bradley. Bradley's method of computating royalty on concentrates smelted at the Yellow Pine Smelter continues the ownership of the values in Bradley subject to a rising or falling market. Contrary to the terms of the contract, this construction of Bradley forces United to share in costs of processing the values exclusively owned by Bradley. In other words, United is forced to deduct from money received from the sale of values in whatever state they may be found, items that are not provided for in the agreement. Thus, Bradley sells its smelted product to a "purchaser" and then deducts items that are not specified in the contract.

Bradley still insists that the "net smelter returns" clause applies regardless of the decision of this Court, regardless of whether the concentrates are sold to an outside smelter, and Bradley's entire offer of testimony was for the sole and admitted purpose of establishing the applicability of the "net smelter returns" provision of the contract to the Yellow Pine Smelter.

Bradley's brief says at page 7:—

> "The question then is, shall United get the same royalty when the concentrates go through a smelter owned by Bradley on the premises—as if they went through an independently owned smelter—or is United to get a greater royalty merely because the smelter is owned by Bradley."

This is not the question.

The question is: Shall Bradley pay a royalty on the amount received from a *purchaser* of values processed at the Yellow Pine Smelter? This has been United's position from December 31, 1941. In the pre-trial conference order United there stated its position as to the issue "are royalties on ores, concentrates, metals and values extracted, taken, or produced from the Meadow Creek and Hennessy Group of mining claims and smelted at the Yellow Pine Smelter to be computed and paid in accordance with the "net revenue" provisions contained and defined in the agreement of December 31, 1941 (R. 430)?

If Bradley elects to further reduce its concentrates, no matter to what extent, before there is a sale, then it profits by 95% of the increase and United gets no more than it is entitled to have under the agreement. To United it seems that Bradley's position is to profit by not paying the full purchase price of the property according to its promise, and that paying according to the terms of the agreement cannot be a "windfall."

The reason for the inclusion of the "net revenue" clause is clear from the record. As early as 1937 it

was expected that the claims would produce values other than antimony and gold which are processed by smelting (R. 103). Before 1939 the provisions of "net revenue" came into being and was included in the 1939 contract after having been fully discussed by the parties (R 105, 113). "Net revenue" is an expression not common in the mining industry and is peculiar to the contract of December 31, 1941 (R 105, 106).

Therefore, there is no precedent in the mining industry which will help explain the purpose of the "net revenue" clause. The contract of December 31, 1941 must stand by itself as no instance where this term has been used by others or has been interpreted by usage or by the courts has been pointed out.

> "We were hunting for a clause that would cover,—the net mint returns was in there, and we were hunting for a clause that would cover these other possibilities. Mr. Worthwine had one suggestion in there and *I changed it with the objective of submitting it to for his approval and Mr. Oberbillig's approval*, a catchall clause that would cover all of these other things that we didn't know just what might be. We knew of several, that the quicksilver didn't come under the net mint and technically it didn't come under net smelter, so that was the course of the conversation, and from that conversation the net revenue clause was picked up." (R 122) (Emphasis supplied.)

Not only was the "net revenue" clause prepared and submitted by Bradley, and the defendant testified

that the "net revenue" clause was devised and included in the agreement as a catchall to cover "the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties" in the event the "net smelter returns" or "net mint" clause is not applicable.

Because the concentrates treated at the Yellow Pine Smelter do not fall within the provisions of the "net smelter returns" provision and because the processed or smelted values are eventually sold to a "purchaser" the "net revenue" provision, not being impossible of application, must be the basis of royalty computations. The record clearly indicates that both parties admit that they were operating under the 1941 contract and prior to the construction of the Yellow Pine Smelter there was no trouble between the parties as to payment of royalties. It was after the construction of the Yellow Pine Smelter that Bradley, on ores handled at the Yellow Pine Smelter, claimed that the basis of payment of royalty was the "net smelter" provision and United claimed that the basis of payment was the "net revenue" provision and that it could be and should be adopted as the basis of payment for royalties on values smelted at the Yellow Pine Smelter and ultimately sold at the mint.

Bear in mind that the December 31, 1941 contract was to continue for 999 years. It must be assumed that both parties intended to operate under that agreement as the same has never been amended by mutual agreement of the parties. Now, with respect

to the operations at the Yellow Pine Smelter, United insists that Bradley comply with the plain, clear and unambiguous terms thereof. Bradley insists that it may amend the agreement by smelting concentrates at its own smelter on the claims and paying royalties on the concentrates "on the basis of past practices of antimony shipments to outside smelters." (R 171; Brief page 19.) This "basis" is rejected by United as not having been the agreement.

The various bases of settlement were all subjects of negotiations before the 1941 contract was drafted and the same were intended to be covered and were covered in the agreement. Certainly, the subject matter of this controversy, to-wit: the method of computing royalties, is mentioned, covered and dealt with in the agreement of 1941, and, therefore, the writing was intended to represent all the transactions on this issue.

Bradley, in its brief, stresses the purification plant and United's failure to object to the payment of royalties between the time the smelter started operations in 1949 and 1951 as indicating a mutual construction of the contract between the parties permitting "net smelter" to be the basis for computing royalties on concentrates passing through the Yellow Pine Smelter. A letter of December 2, 1948 from Bradley to United concerning the "United Mercury Mines Royalty Situation After Smelter Commences Operation" (R 436-440) was written prior to the installation of the Yellow Pine Smelter and at a time when discussions were being had between the parties with reference to the Yellow Pine Smelter. In this

letter (Exhibit 31, R 436-440) Bradley proposes that the contract be amended to provide:

> "That the basis for United Mercury Mines royalty payments from the commencement of the smelter until December 31, 1953 will be the highest amount that would be received if concentrates were shipped under present prevailing contracts."

This is "net smelter" according to the very definition given it by Bradley and was the mode of accounting used by Bradley after the smelter was constructed. Had the "net smelter" provision of the contract as originally drawn covered this situation, there would have been no occasion for this amendment. This proposal was rejected by United and the contract was never amended. This letter (Ex. 31) flatly and completely contradicts the testimony of the witness John Bradley that there was on objection by United to the computation of royalties as made by Bradley on products passing through the Yellow Pine Smelter. This, likewise, refutes any implication that the acceptance of royalties by United from Bradley on concentrates passing through the purification plant was any interpretation or waiver of any of United's rights under the contract.

Prior to 1941 the possibility of a smelter erected by Bradley was discussed. (R 131-134; 160-165.) At the same time the "net revenue" and "net smelter returns" clauses of the agreement were discussed. If it had been intended that the "net smelter returns" provision was to apply to any smelter built by Bradley, the language defining "net smelter returns"

would not have been limited to "the amount received" from a sale to a smelter, and would have said in simple terms that the same provision would apply to any smelter built by Bradley. It must be assumed, under the circumstances, that one of the methods of computing royalty would apply to a Bradley owned smelter and it is submitted that the method applicable is the "net revenue" provision.

Whatever may be the method of intra company accounting that custom existed prior to the agreement of 1941 and was known to Bradley who drafted the "net revenue" clause and was known to him when he testified that the "net revenue" clause was a catch-all, the effect of which would be to cover all instances not included in the "net smelter returns" provision. That custom cannot, therefore, be used by Bradley to explain what his plain language means unless there was some agreement to that effect. What one party to an agreement understands is immaterial, in the absence of fraud; the question is what did both parties agree to.

The trial court did comment to the effect that if Bradley could not deduct its smelting charges, it would result in a substantial increase in the royalty paid United. (R 251) This assumes that the "net smelter" clause is the proper basis for computing royalties and does not take into consideration the following. In smelter charges is the item of depreciation and such a deduction results in United contributing to the costs of constructing the Bradley smelter. When Bradley sells the smelted product it gets a price greater than the value of the concentrates

plus costs of smelting. The result is that Bradley collects the costs of smelting from two sources and included in the sale of the end product is a profit, 5% of which should go to United under the "net revenue" clause. Bradley is profiting unduly and United is losing a substantial portion of the sale price of the property.

There is no question but that the smelting process adds value to a crude ore. But to whose ore? In our case to the ore of Bradley, 95% of which is to its profit and 5% of which is applied to the purchase price of the mining property according to the terms of the contract. If the parties had agreed to pay and accept for the property 5% of the value of the crude ore or concentrates, they could easily have said so. But they did not. On the contrary, it was agreed to pay and accept 5% of the value of the ores in their crude condition (as in the event of sale to a purchaser), in their concentrated form (as when sold to an outside smelter), or in whatsoever condition they may be (as when sold to a purchaser). It must always be remembered that the ore remained the property of Bradley until sold and that Bradley was the sole judge of when the ore would be sold and the condition in which it would be when sold; and Bradley would take 95% of the money received and United 5% thereof, when the price was paid. And in this connection it makes no difference whether "roasting, thermal or electric smelting or refining" is or is not a "mining process" or a "metallurgical" process. That distinction cannot alter the terms of

the contract except upon mutual agreement, which is lacking.

The word "normal" when used in the expression of "normal smelting charges" applies and is material only when the concentrates are sold to an outside smelter. Its definition has no place in determining if the "net revenue" clause does or does not apply here.

The expression "produced from said properties" does not have a strained construction. It is merely a limitation on what "concentrates, ores, metals or values" are affected by the definitions of "net revenue." Before the "net revenue" is to be used as the basis for computing royalties, it must first be determined if the source of the revenue comes from the sale of "concentrates, ores, metals or values" which find their origin in the particular claims.

The trial Court made its own definition of "produced from said properties" and held that it means or is limited to "Marketing ore, concentrates and values *direct to third persons from the mine, after the mining process has been completed.*" We now ask, where in the definition of net revenue is to be found any language which includes, by reference or inference, values "direct to third persons from the mine" or is limited by that phrase? We ask where in the definition is there any requirement or limitation, by reference or inference, that the "net revenue" clause ceases to operate with the cessation of mining process? The time when royalties is to be computed is fixed by the parties to the time when "money is paid by any purchaser" and the royalty is to be paid out of that particular fund.

If the position of the trial Court is correct, then no money is owed for royalties until there has been a sale and if the sale is after treatment of the ores following mining processes, then from the "money paid" must be deducted other undeterminate items to arrive at the amount of the total payment representing the values at the moment mining processes cease. This is a complication no one anticipated or provided for. It is an impractical, complicated and uncertain method not contemplated by either of the parties at the inception of the contract and would have the effect of replacing the contract of December 31, 1941 by the opinion of the court. This complication was recognized by Bradley as early as April of 1948 when in its letter to United (R 382-387, Ex. 11), wherein Bradley sought to amend the contract by providing for a 2.75% royalty for the end product from the smelter. This offer United rejected and elected to stand on the provisions of the contract.

SUMMARY

The contract of December 31, 1941 is a simple, plain and unambiguous contract. The parties have by clear and unambiguous language spelled out the purchase price to be paid by Bradley to United for this property. Plainly, it is 5% of all monies received by Bradley from any products arising from these mining claims. Bradley has attempted to make this contract seem complicated, primarily because it is financially advantageous to Bradley. United is to be paid only when Bradley receives money from the sale of the products of these properties. Until there

is a sale, there is no royalty due and when there is a sale Bradley owes United 5% of the proceeds less the conceded deductions for freight and marketing as spelled out in the contract.

In conclusion, United submits that the trial court erred in admitting any evidence on the applicability of "net smelter" returns, in holding that "net smelter" returns applied, and erred in not holding that under the evidence and decision of this court that the "net revenue" provision applied as a matter of law.

Respectfully submitted,

PAUL S. BOYD,
E. H. CASTERLIN,
DALE CLEMONS

By:
Attorneys for Appellants